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NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NC

SAN FRANCISCO DIVISION

LUCY FUNES, Individually, and on behalf
of all others similarly situated,

Plaintiff,

vs.

INSTAGRAM, INC., a Delaware
Corporation; and INSTAGRAM, LLC, a
Delaware LLC

Defendants.

Case No.

C 12

6482

CLASS ACTION

COMPLAINT FOR:

1. BREACH OF CONTRACT –
VIOLATION OF THE IMPLIED
COVENANT OF GOOD FAITH AND
FAIR DEALING
2. VIOLATION OF CALIFORNIA CIVIL
CODE § 3344;
3. BREACH OF BAILMENT
4. VIOLATION OF CAL. BUS. & PROF.
CODE §§ 17200, *et seq.*;
5. DECLARATORY RELIEF PURSUANT
TO THE FEDERAL DECLARATORY
JUDGMENTS ACT, 28 U.S.C. § 2201

JURY TRIAL DEMANDED

By Fax

1 COMES NOW Lucy Funes ("Plaintiff" or "Funes"), an individual who, based on the
2 investigation of counsel and on information and belief, hereby complains against defendants
3 Instagram, Inc. and Instagram LLC, (collectively, "Instagram" or "Defendants") as follows:

4 **INTRODUCTION**

5 1. Instagram is a web-based photograph sharing platform, which Plaintiff and other
6 California customers use to host and share photographs and artistic content. This action
7 challenges the proposed shift in property rights and irreparable harm resulting from Instagram's
8 unilateral changes to their "Terms of Use" (the "New Terms") that are scheduled to go into effect
9 on or about January 19, 2013. The New Terms transfer valuable property rights to Instagram
10 while simultaneously relieving Instagram from any liability for commercially exploiting
11 customers' photographs and artistic content, while shielding Instagram from legal liability.

12 2. The New Terms transfer to Instagram an irrevocable "transferrable and sub-
13 licensable" worldwide license to the entirety of each customer's intellectual property and
14 personality, including the customer's likeness and artistic content (the "Property"). In this same
15 grab for customer Property rights, Instagram's New Terms seek to disclaim liability for damages,
16 prevent customers from obtaining injunctive or equitable relief to ever stop Instagram, limit all
17 statute of limitations to one year, and prevent customer's from challenging Instagram's conduct
18 in a court of law *via* a no-class-action arbitration clause. Instagram's New Terms:

19 (a) Limit all "DAMAGES, LOSSES OR CAUSES OF ACTION [TO] ONE
20 HUNDRED UNITED STATES DOLLARS (\$100.00)," even though California
21 Civil Code § 3344 provides for statutory damages of \$750.00 for unauthorized
22 commercial use of a person's personality or photograph, and individual damages
23 from unauthorized commercial use of valuable photographic art could be much
24 higher;

25 (b) Cause customers to explicitly agree that "ANY DAMAGES, LOSSES OR
26 INJURIES THAT ARISE OUT OF INSTAGRAM'S ACTS OR OMISSIONS, ...
27 CAUSED TO YOU ARE NOT IRREPARABLE OR SUFFICIENT TO
28

1 ENTITLE YOU TO AN INJUNCTION ..." explicitly disclaiming all "RIGHTS
2 TO ENJOIN OR RESTRAIN" Instagram's conduct;

3 (c) Waive all customer rights to judicial remedies, except small claims, by engrafting
4 a no-class action arbitration clause; and

5 (d) Artificially limit the statute of limitations for all claims against Instagram to one
6 (1) year.

7 3. Instagram is taking its customers' Property rights, while insulating itself from all
8 liability for doing so. Instagram is attempting to prohibit customers from ever stopping or
9 changing Instagram's conduct by seeking a court's equitable and injunctive relief.

10 4. If customers do not agree with Defendant's scheme, they can cancel their profile
11 with Instagram. However, upon canceling, customers forfeit all right to retrieve the Property that
12 was previously entrusted to Instagram, which retains rights thereto in perpetuity. In short,
13 Instagram declares that "possession is nine-tenths of the law and if you don't like it, you can't
14 stop us."

15 5. On behalf of a class of Instagram's California customers, Plaintiff is acting to
16 preserve valuable and important property, statutory, and legal rights, through injunctive,
17 declaratory and equitable relief issued by this Court before such claims are forever barred by
18 adoption of Instagram's New Terms. For this reason, even though the New Terms are not yet
19 effective, this case is "ripe" for adjudication.

20 6. Instagram's New Terms breach its Current Terms of use (*see* paragraph 15,
21 below) by adding new and additional provisions that go far beyond the scope and subject matter
22 of the Current Terms, thereby breaching the Current Terms and the attendant implied covenant
23 of good faith and fair dealing. Similarly, the new "transferrable and sub-licensable" license to
24 Plaintiff and the Class' self photographs and other likeness constitutes a nonconsensual
25 commercial use of "name, voice, signature, photograph, or likeness" in violation of California
26 Civil Code § 3344. Instagram's New Terms also breach its bailment of Plaintiff and the Class'

1 Property because customers delivered their Property to Instagram for their own use and benefit
2 and their individually designated audiences, not for commercial exploitation by Defendants.

3 7. Instagram's breach of the implied covenant of good faith and fair dealing incident
4 to the Current Terms or other implied contract with Plaintiff and the Class, violations of
5 California Civil Code § 3344, and improper misappropriation of property and legal rights
6 constitute unlawful and unfair business practices in violation of California's Unfair Competition
7 Law (the "UCL", CAL. BUS. PROF. CODE §§ 17200, *et seq.*). And because Plaintiff is seeking a
8 declaration of her and other California customers' rights to the Property at issue, Plaintiff seeks
9 relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

10 8. Accordingly, Plaintiff respectfully requests that the Court grant Plaintiff and the
11 California Class the following injunctive, equitable and declaratory remedies:

- 12 (a) Change in the New Terms voiding Defendants' claimed "transferrable and sub-
13 licensable" worldwide license to the Property;
- 14 (b) An injunction and/or declaration that Instagram shall not claim or exercise
15 ownership rights over the Property without Plaintiff and the Class' express
16 authorization.
- 17 (c) A change in Terms and/or the implementation of processes and procedures
18 providing customer controls as to how Instagram and any transferees / sub-
19 licensees can commercially exploit Plaintiff and the Class' Property;
- 20 (d) A declaration or change in the Terms effecting that Plaintiff and the Class do not
21 waive equitable, injunctive or declaratory remedies;
- 22 (e) A change in Terms and/or the implementation of processes and procedures
23 allowing Plaintiff and the Class to download or otherwise obtain exclusive and
24 actual possession of their Property; and
- 25 (f) A declaration or change in the Terms directing that Plaintiff and other California
26 customers do not waive damages upon Instagram or its sub-licensees' violation of
27 Civil Code § 3344.

28

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action pursuant to the Class Action Fairness Act, 28 U.S.C. §§1332(d), 1446, and 1453(b). Plaintiff further allege upon information and belief that the cumulative amount in controversy for Plaintiffs and the class exceed \$5 million, exclusive of interest and costs. Venue is proper in this District pursuant to 28 U.S.C. §1391(a) and (c) because many of the acts and transactions giving rise to the violations of law complained of herein occurred in this District and because Defendants:

- (a) conduct business themselves or through agent(s) in this district, by providing services to Class members located in this District; and/or
- (b) are licensed or registered in this District; and/or
- (c) otherwise have sufficient contacts with this District to justify them being fairly brought into court in this District.

THE PARTIES

10. Plaintiff Lucy Funes is, and at all times material, was a resident of San Diego County, California. At all times relevant hereto, Plaintiff maintain an active account with Instagram containing at least one photograph of Plaintiff, and/or Plaintiff's likeness. Plaintiff maintains and uses the property with Instagram for personal, business and promotional purposes.

11. Defendant Instagram, Inc. is, and at all times relevant to this Complaint was, a corporate citizen of the State of California, headquartered in San Francisco, California, where Instagram Inc.'s officers direct, control, and coordinate the corporation's activities.

12. Defendant Instagram, LLC is, and at all times relevant to this Complaint was, a corporate citizen of the State of California, headquartered in San Francisco, California, where Instagram LLC's officers direct, control, and coordinate the corporation's activities.

13. At all times mentioned in the causes of action alleged herein, each and every defendant was an agent, representative and/or employee of each and every other defendant. In doing the things alleged in the causes of action stated herein, each and every defendant was acting within the course and scope of this agency, authority, representation or employment and

1 was acting with the consent, permission and authorization of each of the remaining defendants.
 2 All actions of each defendant as alleged in the causes of action stated herein were ratified and
 3 approved by every other defendant, or their respective officers or managing agents.

4 **DEFENDANT'S WRONGFUL AND UNLAWFUL ACTS AND PRACTICES**

5 14. Defendants are operators of a social networking website that allows their
 6 customers to take, edit and share images. Instagram allows customers to take photographs from
 7 their Apple or Android powered mobile devices, or cameras, apply artistic filters to the images,
 8 and upload the results to their Instagram profile. These photographs can also be shared on other
 9 online social networks such as Facebook and Twitter. Instagram's service has become
 10 increasingly popular, boasting over 100 million customers.

11 15. Instagram's service is governed by Defendants' "Terms of Use". The current
 12 version of Instagram's terms of use is attached hereto as Exhibit "A" (the "Current Terms"). The
 13 Current Terms provide in pertinent part:

14 **General Conditions**

- 15 * * *
- 16 2. We reserve the right to alter these Terms of Use at any time. If the
 17 alterations constitute a material change to the Terms of Use, we will notify
 18 you via internet mail according to the preference expressed on your
 account. What constitutes a "material change" will be determined at our
 sole discretion, in good faith and using common sense and reasonable
 judgement.

19 **Proprietary Rights in Content on Instagram**

20 Instagram does NOT claim ANY ownership rights in the text, files,
 21 images, photos, video, sounds, musical works, works of authorship,
 22 applications, or any other materials (collectively, "Content") that you post
 23 on or through the Instagram Services. By displaying or publishing
 24 ("posting") any Content on or through the Instagram Services, you hereby
 25 grant to Instagram a non-exclusive, fully paid and royalty-free, worldwide,
 limited license to use, modify, delete from, add to, publicly perform,
 publicly display, reproduce and translate such Content, including without
 limitation distributing part or all of the Site in any media formats through
 any media channels, except Content not shared publicly ("private") will
 not be distributed outside the Instagram Services.

26 See, Ex. "A" (Bold in original, underline added).

1 16. On December 20, 2012 Instagram announced that it would be changing its
 2 Current Terms effective January 19, 2013. A copy of the New Terms are attached hereto as
 3 Exhibit "B," and provide in pertinent part:

4 **General Conditions**

5 ... If we terminate your access to the Service or you use the form detailed above
 6 to deactivate your account, your photos, comments, likes, friendships, and all
 7 other data will no longer be accessible through your account (e.g., users will not
 8 be able to navigate to your username and view your photos), but those materials
 9 and data may persist and appear within the Service (e.g., if your Content has been
 10 reshared by others)

11 * * *

12 **Rights**

13 Instagram does not claim ownership of any Content that you post on or through
 14 the Service. Instead, you hereby grant to Instagram a non-exclusive, fully paid
 15 and royalty-free, transferable, sub-licensable, worldwide license to use the
 16 Content that you post on or through the Service, ...

17 Some or all of the Service may be supported by advertising revenue. To help us
 18 deliver interesting paid or sponsored content or promotions, you agree that a
 19 business or other entity may pay us to display your username, likeness, photos
 20 (along with any associated metadata), and/or actions you take, in connection with
 21 paid or sponsored content or promotions, without any compensation to you. If you
 22 are under the age of eighteen (18), or under any other applicable age of majority,
 23 you represent that at least one of your parents or legal guardians has also agreed
 24 to this provision (and the use of your name, likeness, username, and/or photos
 25 (along with any associated metadata)) on your behalf.

26 * * *

27 **Limitation of Liability; Waiver**

28 UNDER NO CIRCUMSTANCES WILL THE INSTAGRAM PARTIES BE
 LIABLE TO YOU FOR ANY LOSS OR DAMAGES OF ANY KIND ... IN NO
EVENT WILL THE INSTAGRAM PARTIES TOTAL LIABILITY TO YOU
FOR ALL DAMAGES, LOSSES OR CAUSES OR ACTION EXCEED ONE
HUNDRED UNITED STATES DOLLARS (\$100.00).

YOU AGREE THAT IN THE EVENT YOU INCUR ANY DAMAGES,
LOSSES OR INJURIES THAT ARISE OUT OF INSTAGRAM'S ACTS OR
 OMISSIONS, THE DAMAGES, IF ANY, CAUSED TO YOU ARE NOT
IRREPARABLE OR SUFFICIENT TO ENTITLE YOU TO AN INJUNCTION
PREVENTING ANY EXPLOITATION OF ANY WEB SITE, SERVICE,
PROPERTY, PRODUCT OR OTHER CONTENT OWNED OR CONTROLLED
BY THE INSTAGRAM PARTIES, AND YOU WILL HAVE NO RIGHTS TO
ENJOIN OR RESTRAIN THE DEVELOPMENT, PRODUCTION,
DISTRIBUTION, ADVERTISING, EXHIBITION OR EXPLOITATION OF
ANY WEB SITE, PROPERTY, PRODUCT, SERVICE, OR OTHER CONTENT
OWNED OR CONTROLLED BY THE INSTAGRAM PARTIES.

1 BY ACCESSING THE SERVICE, YOU UNDERSTAND THAT YOU MAY BE
 2 WAIVING RIGHTS WITH RESPECT TO CLAIMS THAT ARE AT THIS
 3 TIME UNKNOWN OR UNSUSPECTED, AND IN ACCORDANCE WITH
 4 SUCH WAIVER, YOU ACKNOWLEDGE THAT YOU HAVE READ AND
 5 UNDERSTAND, AND HEREBY EXPRESSLY WAIVE, THE BENEFITS OF
 6 SECTION 1542 OF THE CIVIL CODE OF CALIFORNIA, AND ANY
SIMILAR LAW OF ANY STATE OR TERRITORY, WHICH PROVIDES AS
FOLLOWS: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN
HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS
SETTLEMENT WITH THE DEBTOR."

7 * * *

8 **Arbitration**

9 Except if you opt-out or for disputes relating to: (1) your or Instagram's
 10 intellectual property (such as trademarks, trade dress, domain names, trade
 11 secrets, copyrights and patents); (2) violations of the API Terms; or (3) violations
 12 of provisions 13 or 15 of the Basic Terms, above ("Excluded Disputes"), you
 13 agree that all disputes between you and Instagram (whether or not such dispute
 14 involves a third party) with regard to your relationship with Instagram, including
 15 without limitation disputes related to these Terms of Use, your use of the Service,
 16 and/or rights of privacy and/or publicity, will be resolved by binding, individual
 17 arbitration under the American Arbitration Association's rules for arbitration of
 18 consumer-related disputes and you and Instagram hereby expressly waive trial by
 19 jury. As an alternative, you may bring your claim in your local "small claims"
 20 court, if permitted by that small claims court's rules. You may bring claims only
 21 on your own behalf. Neither you nor Instagram will participate in a class action or
class-wide arbitration for any claims covered by this agreement. You also agree
not to participate in claims brought in a private attorney general or representative
capacity, or consolidated claims involving another person's account, if Instagram
is a party to the proceeding. This dispute resolution provision will be governed by
the Federal Arbitration Act. In the event the American Arbitration Association is
unwilling or unable to set a hearing date within one hundred and sixty (160) days
of filing the case, then either Instagram or you can elect to have the arbitration
administered instead by the Judicial Arbitration and Mediation Services.
Judgment on the award rendered by the arbitrator may be entered in any court
having competent jurisdiction. Any provision of applicable law notwithstanding,
the arbitrator will not have authority to award damages, remedies or awards that
conflict with these Terms of Use.

22 You may opt out of this agreement to arbitrate. If you do so, neither you nor
 23 Instagram can require the other to participate in an arbitration proceeding. To opt
 24 out, you must notify Instagram in writing within 30 days of the date that you first
 25 became subject to this arbitration provision. You must use this address to opt out:

26 Instagram, LLC ATTN: Arbitration Opt-out 1601 Willow Rd. Menlo Park, CA
 27 94025

28 You must include your name and residence address, the email address you use for
 your Instagram account, and a clear statement that you want to opt out of this
 arbitration agreement.

1 If the prohibition against class actions and other claims brought on behalf of third
2 parties contained above is found to be unenforceable, then all of the preceding
3 language in this Arbitration section will be null and void. This arbitration
4 agreement will survive the termination of your relationship with Instagram.

5 **Time Limitation on Claims**

6 You agree that any claim you may have arising out of or related to your
7 relationship with Instagram must be filed within one year after such claim arose;
8 otherwise, your claim is permanently barred.

9 *See, Ex. "B"* (Bold in original, underline added).

10 17. Defendants originally posted an earlier version of the New Terms on the
11 Instagram blog on December 18, 2012. Customer and media backlash against Instagram's New
12 Terms were overwhelmingly negative. That same day, Defendants posted a purported
13 clarification of the New Terms on the Instagram Blog. Instagram stated that the New Terms were
14 "interpreted by many that we were going to sell your photos to others without any compensation.
15 This is not true and it is our mistake that this language is confusing. To be clear: it is not our
16 intention to sell your photos. We are working on updated language in the terms to make sure this
17 is clear."

18 18. Instagram's December 18, 2012 press release also stated that the New Terms
19 "also raised question [*sic*] about whether your photos can be part of an advertisement. We do not
20 have plans for anything like this and because of that we're going to remove the language that
21 raised the question."

22 19. Finally, Defendants' December 18, 2012 press release stated that "Instagram users
23 own their content and Instagram does not claim any ownership rights over your photos. Nothing
24 about this has changed." (Emphasis added). While technically true, Instagram's unilateral grant
25 to itself of an irrevocable, transferrable and sub-licensable worldwide license appropriates
26 significant rights to the Property while depriving Plaintiff and the Class of value and control over
27 their Property.

28 20. On December 20, 2012, Instagram posted the final version of the New Terms on
its website. The purported concessions by Instagram in its press release and final version of the
New Terms were nothing more than a public relations campaign to address public discontent.

1 Specifically, the concessions in Instagram's press release were not binding, and the revised New
2 Terms failed to address:

3 (a) Defendants' irrevocable grant of a "transferrable and sub-licensable" worldwide
4 license to Plaintiff and the Class' Property;

5 (b) Defendants' waiver of important legal, equitable, and substantive rights to, *inter alia*,
6 damages, injunctive and equitable remedies, and judicial process; and

7 (c) Defendants' future ability to sell, appropriate, transfer or otherwise encumber
8 Plaintiff and the Class' Property after Defendants' class-action waiver, waiver of
9 damages and injunctive and equitable relief comes into effect after January 16, 2013.

10 21. Defendants' need only implement a two step process to fully appropriate the
11 Property of Plaintiff and the Class. First, New Terms incorporate the class-action waiver, waiver
12 of damages, as well as injunctive and equitable relief. After the New Terms become effective,
13 Instagram can add additional terms and conditions that allow Defendants to misappropriate and
14 otherwise commercially exploit the Property with no recourse available to Plaintiff and the Class.

15 **CLASS ACTION ALLEGATIONS**

16 22. Plaintiff brings this action as a class action pursuant to Federal Rules of Civil
17 Procedure 23(a), (b)(2) and (b)(3) for the following Class of persons:

18 All natural persons who, while residents of the State of California, maintain an
19 active Instagram account subject to Instagram's Terms in effect prior to January 19,
2013, containing at least one photograph of the owner of the account.

20 Excluded from the Class are all governmental entities, Defendants herein and any person, firm,
21 trust, corporation, or other entity related to or affiliated with Defendants, as well as any judge,
22 justice or judicial officer presiding over this matter and members of their immediate families and
23 judicial staff.

24 23. The members of the Class are so numerous that joinder of all Class members is
25 impracticable. While the exact number of Class members is unknown to Plaintiff at this time and
26 will be ascertained through appropriate discovery, Plaintiff is informed and believes that there
27 are tens of thousands of members in the proposed Class. As Plaintiff and members of the Class

1 provide, at the least, their name, and email address to Instagram upon registering for an
2 Instagram account, such that members of the Class can be identified from records maintained by
3 Defendants.

4 24. Plaintiff's claims are typical of the claims of the other members of the Class. All
5 members of the Class will be similarly affected by Defendants' wrongful conduct, as complained
6 of herein, in violation of California law. Plaintiffs have no interests adverse to the Class.

7 25. Plaintiff will fairly and adequately protect the Class members' interests and has
8 retained counsel competent and experienced in consumer class action lawsuits and complex
9 litigation.

10 26. Defendants have acted, with respect to the Class, in a manner generally applicable
11 to each Class member. Common questions of law and fact exist as to all Class members and
12 predominate over any questions wholly affecting individual Class members. There is a well-
13 defined community of interest in the questions of law and fact involved in this action, which
14 affect all Class members. Among the questions of law and fact common to the Class are, *inter*
15 *alia*:

16 (a) Whether Defendants' unilateral change of contract terms goes beyond what
17 Defendants' current Terms permit, thus violating the implied covenant of good
18 faith and fair dealing;

19 (b) Whether Defendants' new "transferrable and sub-licensable" license to Plaintiff
20 and the Class' self photographs and other likeness constitutes a nonconsensual
21 commercial use of "name, voice, signature, photograph, or likeness" in violation
22 of California Civil Code § 3344;

23 (c) Whether Plaintiff and the Class transfer of their Property to Defendants
24 constituted a bailment, and whether Defendants breached that bailment;

25 (d) Whether Defendants' new Terms constitute unlawful and/or unfair business
26 practices in violation of the UCL, including:

1 (i) Whether Defendants' new Terms constitute "unfair" business practices
2 because: consumer injury outweighs any countervailing benefits to
3 consumers or competition, and because such injury could not be reasonably
4 avoided by consumers;

5 (ii) Whether Defendants' new Terms constitute "unfair" business practices by
6 violating established public policy;

7 (iii) Whether Defendants' new Terms constitute "unfair" business practices
8 because they are immoral, unethical, oppressive, unscrupulous or
9 substantially injurious to consumers.

10 (e) Whether Defendants can unilaterally limit damages, statutes of limitation(s),
11 access to judicial process and bar equitable injunctive relief;

12 (f) Whether Plaintiff and the Class are entitled to declaratory relief under 28 U.S.C. §
13 2201, or otherwise;

14 (g) Whether Defendants acted in concert or were otherwise each others' agent, alter
15 ego, aiders and abettors, enablers, or duly authorized representatives with respect
16 to the new Terms or otherwise aided and abetted or enabled the misconduct of
17 other defendants as alleged herein;

18 (h) The nature and extent of damages, equitable remedies, and injunctive relief to
19 which Plaintiff and the other members of the Class are entitled; and

20 (i) Whether Plaintiff and the members of the Class should be awarded attorneys' fees
21 and the costs of suit herein.

22 27. A class action is superior to all other available methods for the fair and efficient
23 adjudication of this controversy since joinder of all members is impracticable. Furthermore, as
24 the damages / injury suffered by individual Class members may be relatively small, the expense
25 and burden of individual litigation make it virtually impossible for Class members to
26 individually redress the wrongs done to them. There will be no difficulty in managing this action
27 as a class action.

28. Defendants have acted on grounds generally applicable to the entire Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole.

29. Plaintiff reserves the right to revise the above class definition based on information learned during discovery.

FIRST COUNT

(Breach of Actual and Implied Contract - Violation of the Implied Covenant of Good Faith and Fair Dealing)

30. Plaintiff incorporates by reference each and every forgoing paragraph, as though fully set forth at length herein.

31. Plaintiff and each Class member are subject to Instagram's current Terms, for which Instagram has an implied covenant of good faith and fair dealing.

32. Instagram interferes with and frustrates Plaintiff and the Class' use of the Instagram's service, as provided by Defendants' current Terms and Defendants' conduct, by attempting to add provisions that were not reasonably anticipated by the current Terms, and not in accordance with the subject matter, and / or scope of the current Terms.

33. Defendants' unreasonable change of Terms accordingly violates the implied covenant of good faith and fair dealing inherent in Instagram's current Terms.

34. As a direct and proximate result of Defendants' breaches of the implied covenant of good faith and fair dealing, Plaintiff and each member of the Class sustain loss of valuable rights in their Property in an amount to be proved at the trial of this matter.

35. An injunction prohibiting Defendants from implementing the new Terms is in the public interest. Absent an injunction, Plaintiff and each member of the Class will suffer irreparable harm, and the continuing threat of wrongful misappropriation of their Property by Defendants.

SECOND COUNT

(Violation of California Civil Code § 3344)

36. Plaintiff incorporates by reference each and every forgoing paragraph, as though fully set forth at length herein.

1 37. California's Right of Publicity Statute, California Civil Code §§ 3344 *et seq.*,
2 protects persons from the unauthorized appropriation of the person's identity by another for
3 commercial gain.

4 38. Instagram's new Terms allows Defendants to knowingly use Plaintiff and the
5 Class' names, photographs, or likenesses to directly advertise or sell a product or service.

6 39. Instagram does not have Plaintiff or the Class' consent to do so.

7 40. Plaintiff and the Class receive no compensation or other consideration from
8 Instagram for using Plaintiff and the Class' names, photographs, and/or likenesses to directly
9 advertise or sell a product or service.

10 41. Plaintiff and the Class will be irreparably harmed by Instagram's actions.

11 42. Use of Plaintiff and the Class' names, photographs, and likenesses are necessarily
12 directly connected to Instagram's commercial use, as opposed to news, public affairs, a sports
13 broadcast or account, or a political campaign.

14 43. Instagram's actions are a substantial factor in causing Plaintiff and the Class
15 harm.

16 44. An injunction prohibiting Defendants from implementing the new Terms is in the
17 public interest. Absent an injunction, Plaintiff and each member of the Class will suffer
18 irreparable harm, and the continuing threat of wrongful misappropriation of their Property by
19 Defendants.

20 **THIRD COUNT**
21 **(Breach of Bailment)**

22 45. Plaintiff incorporates by reference each and every forgoing paragraph, as though
23 fully set forth at length herein.

24 46. Plaintiff and the Class each delivered to Defendants their Property.

25 47. Under Instagram's current Terms - those in effect prior to January 16, 2012 -
26 Instagram agreed to disclaim any ownership rights in Plaintiff and the Class' property, and to
27 hold and maintain the Property for the exclusive benefit of Plaintiff and the Class.

48. While Defendants are in possession of Plaintiff and the Class' Property, they were in dominion and control of the Property. The new Terms misappropriate Plaintiff and the Class' rights to their Property, which Plaintiff and the Class are not able to avoid unless they delete their Instagram account. Even then, Plaintiff and the Class are not able to demand redelivery of their Property from Instagram, which maintains rights thereto in perpetuity.

49. Defendants' change in Terms constitutes a breach of ordinary care and diligence in the handling of Plaintiff and the Class' Property, and in fact misappropriates valuable and important property rights of Plaintiff and the Class.

50. As a direct and proximate result of Defendants' breach of bailment of the Property, Plaintiff and the Class suffer injury and lost rights to their Property in an amount to be proved at trial.

51. An injunction prohibiting Defendants from implementing the current Terms is in the public interest. Absent an injunction, Plaintiff and each member of the Class will suffer irreparable harm, and the continuing threat of wrongful misappropriation of their Property by Defendants.

FOURTH COUNT
(Violation of CAL. BUS. & PROF. CODE §§ 17200, *et seq.*)

52. Plaintiff incorporates by reference each and every forgoing paragraph, as though fully set forth at length herein.

53. Defendants acts, conduct and practices, as described herein, constitute unlawful and unfair business acts and practices within the meaning of California Business and Professions Code sections 17200, *et seq.*

54. Defendants' unilateral change of the Terms constitutes "unfair" business practices because: injury to Plaintiff and the Class outweighs any countervailing benefits to consumers or competition, and because such injury could not be reasonably avoided by Plaintiff and the Class.

55. Defendants' unilateral change of the Terms constitutes "unlawful" and "unfair" business practices by violating established public policy as embodied in California Civil Code § 3344.

FIFTH COUNT

**(Declaratory Relief Pursuant to the Declaratory
Judgment Act 28 U.S.C. § 2201)**

60. Plaintiff incorporates by reference each and every forgoing paragraph, as though fully set forth at length herein.

61. Defendants seek to irrevocably change the legal rights between Plaintiff and the Class in the form of Instagram's new Terms that become effective on January 13, 2012.

62. Plaintiff and the Class are entitled to have this Court establish by declaration their rights and legal relations under Instagram's terms of service.

1 **DEMAND FOR TRIAL BY JURY**

2 63. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, and the Seventh
3 Amendment to the United States Constitution, Plaintiff hereby demands a trial by jury of all of
4 the claims asserted in this Complaint so triable.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff and the Class pray for relief and judgment as follows:

7 A. For an order declaring that this action is properly maintained as a class action and
8 certifying a class representative in accordance with Rule 23 of the Federal Rules
9 of Civil Procedure;

10 B. For an order enjoining Defendants from enacting and/or enforcing the Terms as
11 alleged herein;

12 C. For injunctive, declaratory and other equitable relief as follows:

13 (i) Change in the New Terms voiding Defendants' claimed "transferrable and
14 sub-licensable" worldwide license to the Property;

15 (ii) An injunction and/or declaration that Instagram shall not claim or exercise
16 ownership rights over the Property without Plaintiff and the Class' express authorization.

17 (iii) A change in Terms and/or the implementation of processes and procedures
18 providing customer controls as to how Instagram and any transferees / sub-licensees can
19 commercially exploit Plaintiff and the Class' Property;

20 (iv) A declaration or change in the Terms effecting that Plaintiff and the Class
21 do not waive equitable, injunctive or declaratory remedies;

22 (v) A change in Terms and/or the implementation of processes and procedures
23 allowing Plaintiff and the Class to download or otherwise obtain exclusive and actual
24 possession of their Property; and

25 (vi) A declaration or change in the Terms directing that Plaintiff and other
26 California customers do not waive damages upon Instagram or its sub-licensees'
27 violation of Civil Code § 3344.

- 1 D. For an order awarding attorneys' fees and costs of suit, including experts' witness
2 fees as permitted by law; and
3 E. Such other and further relief as this Court may deem just and proper.
4

5 Dated: December 21, 2012

Respectfully submitted,

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EXHIBIT A

ABOUT

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Terms of Use

We are updating our Terms of Use: Our updated Terms of Use will be effective on January 16, 2013.

By using the instagram.com website and Instagram service you are agreeing to be bound by the following terms and conditions ("Terms of Use").

Basic Terms

1. You must be 13 years or older to use this site.
2. You may not post nude, partially nude, or sexually suggestive photos.
3. You are responsible for any activity that occurs under your screen name.
4. You are responsible for keeping your password secure.
5. You must not abuse, harass, threaten, impersonate or intimidate other Instagram users.
6. You may not use the Instagram service for any illegal or unauthorized purpose. International users agree to comply with all local laws regarding online conduct and acceptable content.
7. You are solely responsible for your conduct and any data, text, information, screen names, graphics, photos, profiles, audio and video clips, links ("Content") that you submit, post, and display on the Instagram service.
8. You must not modify, adapt or hack Instagram or modify another website so as to falsely imply that it is associated with Instagram.
9. You must not access Instagram's private API by any other means other than the Instagram application itself.
10. You must not crawl, scrape, or otherwise cache any content from Instagram including but not limited to user profiles and photos.
11. You must not create or submit unwanted email or comments to any Instagram members ("Spam").
12. You must not use web URLs in your name without prior written consent from Instagram, inc.
13. You must not transmit any worms or viruses or any code of a destructive nature.
14. You must not, in the use of Instagram, violate any laws in your jurisdiction (including but not limited to copyright laws).
15. Violation of any of these agreements will result in the termination of your Instagram account. While Instagram prohibits such conduct and content on its site, you understand and agree that Instagram cannot be responsible for the Content posted on its web site and you nonetheless may be exposed to such materials and that you use the Instagram service at your own risk.

General Conditions

1. We reserve the right to modify or terminate the Instagram service for any reason, without notice at any time.
2. We reserve the right to alter these Terms of Use at any time. If the alterations constitute a material change to the Terms of Use, we will notify you via internet mail according to the preference expressed on your account. What constitutes a "material change" will be determined at our sole discretion, in good faith and using common sense and reasonable judgement.
3. We reserve the right to refuse service to anyone for any reason at any time.
4. We reserve the right to force forfeiture of any username that becomes inactive, violates trademark, or may mislead other users.
5. We may, but have no obligation to, remove Content and accounts containing Content that we determine in our sole discretion are unlawful, offensive, threatening, libelous, defamatory, obscene or otherwise objectionable or violates any party's intellectual property or these Terms of Use.
6. We reserve the right to reclaim usernames on behalf of businesses or individuals that hold legal claim or trademark on those usernames.

Proprietary Rights in Content on Instagram

1. Instagram does NOT claim ANY ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials (collectively, "Content") that you post on or through the Instagram Services. By displaying or publishing ("posting") any Content on or through the Instagram Services, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, worldwide, limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce and translate such Content, including without limitation distributing part or all of the Site in any media formats through any media channels, except Content not shared publicly ("private") will not be distributed outside the Instagram Services.
2. Some of the Instagram Services are supported by advertising revenue and may display advertisements and promotions, and you hereby agree that Instagram may place such advertising and promotions on the Instagram Services or on, about, or in conjunction with your Content. The manner, mode and extent of such advertising and promotions are subject to change without specific notice to you.
3. You represent and warrant that: (i) you own the Content posted by you on or through the Instagram Services or otherwise have the right to grant the license set forth in this section, (ii) the posting and use of your Content on or through the Instagram Services does not violate the privacy rights, publicity rights, copyrights, contract rights, intellectual property rights or any other rights of any person, and (iii) the posting of your Content on the Site does not result in a breach of contract between you and a third party. You agree to pay for all royalties, fees, and any other monies owing any person by reason of Content you post on or through the Instagram Services.

4. The Instagram Services contain Content of Instagram ("Instagram Content"). Instagram Content is protected by copyright, trademark, patent, trade secret and other laws, and Instagram owns and retains all rights in the Instagram Content and the Instagram Services. Instagram hereby grants you a limited, revocable, nonsubicensable license to reproduce and display the Instagram Content (excluding any software code) solely for your personal use in connection with viewing the Site and using the Instagram Services.
5. The Instagram Services contain Content of Users and other Instagram licensors. Except as provided within this Agreement, you may not copy, modify, translate, publish, broadcast, transmit, distribute, perform, display, or sell any Content appearing on or through the Instagram Services.
6. Instagram performs technical functions necessary to offer the Instagram Services, including but not limited to ~~transcoding and/or reformatting Content to allow its use throughout the Instagram Services.~~
7. Although the Site and other Instagram Services are normally available, there will be occasions when the Site or other Instagram Services will be interrupted for scheduled maintenance or upgrades, for emergency repairs, or due to failure of telecommunications links and equipment that are beyond the control of Instagram. Also, although Instagram will normally only delete Content that violates this Agreement, Instagram reserves the right to delete any Content for any reason, without prior notice. Deleted content may be stored by Instagram in order to comply with certain legal obligations and is not retrievable without a valid court order. Consequently, Instagram encourages you to maintain your own backup of your Content. In other words, Instagram is not a backup service. Instagram will not be liable to you for any modification, suspension, or discontinuation of the Instagram Services, or the loss of any Content.

EXHIBIT B

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Terms of Use

These Terms of Use are effective on January 19, 2013. To access our previous Terms of Use, please [click here](#).

By accessing or using the Instagram website, the Instagram service, or any applications (including mobile applications) made available by Instagram (together, the "Service"), however accessed, you agree to be bound by these terms of use ("Terms of Use"). The Service is owned or controlled by Instagram, LLC ("Instagram"). **These Terms of Use affect your legal rights and obligations. If you do not agree to be bound by all of these Terms of Use, do not access or use the Service.**

There may be times when we offer a special feature that has its own terms and conditions that apply in addition to these Terms of Use. In those cases, the terms specific to the special feature control to the extent there is a conflict with these Terms of Use.

ARBITRATION NOTICE: EXCEPT IF YOU OPT-OUT AND EXCEPT FOR CERTAIN TYPES OF DISPUTES DESCRIBED IN THE ARBITRATION SECTION BELOW, YOU AGREE THAT DISPUTES BETWEEN YOU AND INSTAGRAM WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION AND YOU WAIVE YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT OR CLASS-WIDE ARBITRATION.

Basic Terms

1. You must be at least 13 years old to use the Service.
2. You may not post violent, nude, partially nude, discriminatory, unlawful, infringing, hateful, pornographic or sexually suggestive photos or other content via the Service.
3. You are responsible for any activity that occurs through your account and you agree you will not sell, transfer, license or assign your account, followers, username, or any account rights. With the exception of people or businesses that are expressly authorized to create accounts on behalf of their employers or clients, Instagram prohibits the creation of and you agree that you will not create an account for anyone other than yourself. You also represent that all information you provide or provided to Instagram upon registration and at all other times will be true, accurate, current and complete and you agree to update your information as necessary to maintain its truth and accuracy.
4. You agree that you will not solicit, collect or use the login credentials of other Instagram users.
5. You are responsible for keeping your password secret and secure.
6. You must not defame, stalk, bully, abuse, harass, threaten, impersonate or intimidate people or entities and you must not post private or confidential information via the Service, including, without limitation, your or any other person's credit card information, social security or alternate national identity numbers, non-public phone numbers or non-public email addresses.
7. You may not use the Service for any illegal or unauthorized purpose. You agree to comply with all laws, rules and regulations (for example, federal, state, local and provincial) applicable to your use of the Service and your Content (defined below), including but not limited to, copyright laws.
8. You are solely responsible for your conduct and any data, text, files, information, usernames, images, graphics, photos, profiles, audio and video clips, sounds, musical works, works of authorship, applications, links and other content or materials (collectively, "Content") that you submit, post or display on or via the Service.
9. You must not change, modify, adapt or alter the Service or change, modify or alter another website so as to falsely imply that it is associated with the Service or Instagram.
10. You must not access Instagram's private API by means other than those permitted by Instagram. Use of Instagram's API is subject to a separate set of terms available here: <http://instagram.com/about/legal/terms/api/> ("API Terms").
11. You must not create or submit unwanted email, comments, likes or other forms of commercial or harassing communications (a/k/a "spam") to any Instagram users.
12. You must not use domain names or web URLs in your username without prior written consent from Instagram.
13. You must not interfere or disrupt the Service or servers or networks connected to the Service, including by transmitting any worms, viruses, spyware, malware or any other code of a destructive or disruptive nature. You may not inject content or code or otherwise alter or interfere with the way any Instagram page is rendered or displayed in a user's browser or device.
14. You must comply with Instagram's Community Guidelines, available here: <http://help.instagram.com/customer/portal/articles/262387-community-guidelines>.
15. You must not create accounts with the Service through unauthorized means, including but not limited to, by using an automated device, script, bot, spider, crawler or scraper.
16. You must not attempt to restrict another user from using or enjoying the Service and you must not encourage or facilitate violations of these Terms of Use or any other Instagram terms.
17. Violation of these Terms of Use may, in Instagram's sole discretion, result in termination of your Instagram account. You understand and agree that Instagram cannot and will not be responsible for the Content posted on the Service and you use the Service at your own risk. If you violate the letter or spirit of these Terms of Use, or otherwise create risk or possible legal exposure for Instagram, we can stop providing all or part of the Service to you.

General Conditions

1. We reserve the right to modify or terminate the Service or your access to the Service for any reason, without notice, at any time, and without liability to you. You can deactivate your Instagram account by logging into the

Service and completing the form available here: <https://instagram.com/accounts/remove/request/>. If we terminate your access to the Service or you use the form detailed above to deactivate your account, your photos, comments, likes, friendships, and all other data will no longer be accessible through your account (e.g., users will not be able to navigate to your username and view your photos), but those materials and data may persist and appear within the Service (e.g., if your Content has been reshared by others).

2. Upon termination, all licenses and other rights granted to you in these Terms of Use will immediately cease.
3. We reserve the right, in our sole discretion, to change these Terms of Use ("Updated Terms") from time to time. Unless we make a change for legal or administrative reasons, we will provide reasonable advance notice before the Updated Terms become effective. You agree that we may notify you of the Updated Terms by posting them on the Service, and that your use of the Service after the effective date of the Updated Terms (or engaging in such other conduct as we may reasonably specify) constitutes your agreement to the Updated Terms. Therefore, you should review these Terms of Use and any Updated Terms before using the Service. The Updated Terms will be effective as of the time of posting, or such later date as may be specified in the Updated Terms, and will apply to your use of the Service from that point forward. These Terms of Use will govern any disputes arising before the effective date of the Updated Terms.
4. We reserve the right to refuse access to the Service to anyone for any reason at any time.
5. We reserve the right to force forfeiture of any username for any reason.
6. We may, but have no obligation to, remove, edit, block, and/or monitor Content or accounts containing Content that we determine in our sole discretion violates these Terms of Use.
7. You are solely responsible for your interaction with other users of the Service, whether online or offline. You agree that Instagram is not responsible or liable for the conduct of any user. Instagram reserves the right, but has no obligation, to monitor or become involved in disputes between you and other users. Exercise common sense and your best judgment when interacting with others, including when you submit or post Content or any personal or other information.
8. There may be links from the Service, or from communications you receive from the Service, to third-party web sites or features. There may also be links to third-party web sites or features in images or comments within the Service. The Service also includes third-party content that we do not control, maintain or endorse. Functionality on the Service may also permit interactions between the Service and a third-party web site or feature, including applications that connect the Service or your profile on the Service with a third-party web site or feature. For example, the Service may include a feature that enables you to share Content from the Service or your Content with a third party, which may be publicly posted on that third party's service or application. Using this functionality typically requires you to login to your account on the third-party service and you do so at your own risk. Instagram does not control any of these third-party web services or any of their content. You expressly acknowledge and agree that Instagram is in no way responsible or liable for any such third-party services or features. YOUR CORRESPONDENCE AND BUSINESS DEALINGS WITH THIRD PARTIES FOUND THROUGH THE SERVICE ARE SOLELY BETWEEN YOU AND THE THIRD PARTY. You may choose, at your sole and absolute discretion and risk, to use applications that connect the Service or your profile on the Service with a third-party service (each, an "Application") and such Application may interact with, connect to or gather and/or pull information from and to your Service profile. By using such Applications, you acknowledge and agree to the following: (i) if you use an Application to share information, you are consenting to information about your profile on the Service being shared; (ii) your use of an Application may cause personally identifying information to be publicly disclosed and/or associated with you, even if Instagram has not itself provided such information; and (iii) your use of an Application is at your own option and risk, and you will hold the Instagram Parties (defined below) harmless for activity related to the Application.
9. You agree that you are responsible for all data charges you incur through use of the Service.
10. We prohibit crawling, scraping, caching or otherwise accessing any content on the Service via automated means, including but not limited to, user profiles and photos (except as may be the result of standard search engine protocols or technologies used by a search engine with Instagram's express consent).

Rights

1. Instagram does not claim ownership of any Content that you post on or through the Service. Instead, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service, subject to the Service's Privacy Policy, available here <http://instagram.com/legal/privacy/>, including but not limited to sections 3 ("Sharing of Your Information"), 4 ("How We Store Your Information"), and 5 ("Your Choices About Your Information"). You can choose who can view your Content and activities, including your photos, as described in the Privacy Policy.
2. Some of the Service is supported by advertising revenue and may display advertisements and promotions, and you hereby agree that Instagram may place such advertising and promotions on the Service or on, about, or in conjunction with your Content. The manner, mode and extent of such advertising and promotions are subject to change without specific notice to you.
3. You acknowledge that we may not always identify paid services, sponsored content, or commercial communications as such.
4. You represent and warrant that: (i) you own the Content posted by you on or through the Service or otherwise have the right to grant the rights and licenses set forth in these Terms of Use; (ii) the posting and use of your Content on or through the Service does not violate, misappropriate or infringe on the rights of any third party, including, without limitation, privacy rights, publicity rights, copyrights, trademark and/or other intellectual property rights; (iii) you agree to pay for all royalties, fees, and any other monies owed by reason of Content you post on or through the Service; and (iv) you have the legal right and capacity to enter into these Terms of Use in your jurisdiction.
5. The Service contains content owned or licensed by Instagram ("Instagram Content"). Instagram Content is protected by copyright, trademark, patent, trade secret and other laws, and, as between you and Instagram, Instagram owns and retains all rights in the Instagram Content and the Service. You will not remove, alter or conceal any copyright, trademark, service mark or other proprietary rights notices incorporated in or accompanying the Instagram Content and you will not reproduce, modify, adapt, prepare derivative works based

on, perform, display, publish, distribute, transmit, broadcast, sell, lease or otherwise exploit the Instagram Content.

6. The Instagram name and logo are trademarks of Instagram, and may not be copied, imitated or used, in whole or in part, without the prior written permission of Instagram, except in accordance with our brand guidelines, available here: <http://help.instagram.com/customer/portal/articles/182487>. In addition, all page headers, custom graphics, button icons and scripts are service marks, trademarks and/or trade dress of Instagram, and may not be copied, imitated or used, in whole or in part, without prior written permission from Instagram.
7. Although it is Instagram's intention for the Service to be available as much as possible, there will be occasions when the Service may be interrupted, including, without limitation, for scheduled maintenance or upgrades, for emergency repairs, or due to failure of telecommunications links and/or equipment. Also, Instagram reserves the right to remove any Content from the Service for any reason, without prior notice. Content removed from the Service may continue to be stored by Instagram, including, without limitation, in order to comply with certain legal obligations, but may not be retrievable without a valid court order. Consequently, Instagram encourages you to maintain your own backup of your Content. In other words, Instagram is not a backup service and you agree that you will not rely on the Service for the purposes of Content backup or storage. Instagram will not be liable to you for any modification, suspension, or discontinuation of the Services, or the loss of any Content. You also acknowledge that the Internet may be subject to breaches of security and that the submission of Content or other information may not be secure.
8. You agree that Instagram is not responsible for, and does not endorse, Content posted within the Service. Instagram does not have any obligation to prescreen, monitor, edit, or remove any Content. If your Content violates these Terms of Use, you may bear legal responsibility for that Content.
9. Except as otherwise described in the Service's Privacy Policy, available at <http://instagram.com/legal/privacy/>, as between you and Instagram, any Content will be non-confidential and non-proprietary and we will not be liable for any use or disclosure of Content. You acknowledge and agree that your relationship with Instagram is not a confidential, fiduciary, or other type of special relationship, and that your decision to submit any Content does not place Instagram in a position that is any different from the position held by members of the general public, including with regard to your Content. None of your Content will be subject to any obligation of confidence on the part of Instagram, and Instagram will not be liable for any use or disclosure of any Content you provide.
10. It is Instagram's policy not to accept or consider content, information, ideas, suggestions or other materials other than those we have specifically requested and to which certain specific terms, conditions and requirements may apply. This is to avoid any misunderstandings if your ideas are similar to those we have developed or are developing independently. Accordingly, Instagram does not accept unsolicited materials or ideas, and takes no responsibility for any materials or ideas so transmitted. If, despite our policy, you choose to send us content, information, ideas, suggestions, or other materials, you further agree that Instagram is free to use any such content, information, ideas, suggestions or other materials, for any purposes whatsoever, including, without limitation, developing and marketing products and services, without any liability or payment of any kind to you.

Reporting Copyright and Other IP Violations

1. We respect other people's rights, and expect you to do the same.
2. We provide you with tools to help you protect your intellectual property rights. To learn more about how to report claims of intellectual property infringement, visit: <http://help.instagram.com/customer/portal/articles/270501>
3. If you repeatedly infringe other people's intellectual property rights, we will disable your account when appropriate.

Disclaimer of Warranties

THE SERVICE, INCLUDING, WITHOUT LIMITATION, INSTAGRAM CONTENT, IS PROVIDED ON AN "AS IS", "AS AVAILABLE" AND "WITH ALL FAULTS" BASIS. TO THE FULLEST EXTENT PERMISSIBLE BY LAW, NEITHER INSTAGRAM NOR ITS PARENT COMPANY NOR ANY OF THEIR EMPLOYEES, MANAGERS, OFFICERS OR AGENTS (COLLECTIVELY, THE "INSTAGRAM PARTIES") MAKE ANY REPRESENTATIONS OR WARRANTIES OR ENDORSEMENTS OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, AS TO: (A) THE SERVICE; (B) THE INSTAGRAM CONTENT; (C) USER CONTENT; OR (D) SECURITY ASSOCIATED WITH THE TRANSMISSION OF INFORMATION TO INSTAGRAM OR VIA THE SERVICE. IN ADDITION, THE INSTAGRAM PARTIES HEREBY DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, TITLE, CUSTOM, TRADE, QUIET ENJOYMENT, SYSTEM INTEGRATION AND FREEDOM FROM COMPUTER VIRUS.

THE INSTAGRAM PARTIES DO NOT REPRESENT OR WARRANT THAT THE SERVICE WILL BE ERROR-FREE OR UNINTERRUPTED; THAT DEFECTS WILL BE CORRECTED; OR THAT THE SERVICE OR THE SERVER THAT MAKES THE SERVICE AVAILABLE IS FREE FROM ANY HARMFUL COMPONENTS, INCLUDING, WITHOUT LIMITATION, VIRUSES. THE INSTAGRAM PARTIES DO NOT MAKE ANY REPRESENTATIONS OR WARRANTIES THAT THE INFORMATION (INCLUDING ANY INSTRUCTIONS) ON THE SERVICE IS ACCURATE, COMPLETE, OR USEFUL. YOU ACKNOWLEDGE THAT YOUR USE OF THE SERVICE IS AT YOUR SOLE RISK. THE INSTAGRAM PARTIES DO NOT WARRANT THAT YOUR USE OF THE SERVICE IS LAWFUL IN ANY PARTICULAR JURISDICTION, AND THE INSTAGRAM PARTIES SPECIFICALLY DISCLAIM SUCH WARRANTIES. SOME JURISDICTIONS LIMIT OR DO NOT ALLOW THE DISCLAIMER OF IMPLIED OR OTHER WARRANTIES SO THE ABOVE DISCLAIMER MAY NOT APPLY TO YOU TO THE EXTENT SUCH JURISDICTION'S LAW IS APPLICABLE TO YOU AND THESE TERMS OF USE.

BY ACCESSING OR USING THE SERVICE YOU REPRESENT AND WARRANT THAT YOUR ACTIVITIES ARE LAWFUL IN EVERY JURISDICTION WHERE YOU ACCESS OR USE THE SERVICE.

THE INSTAGRAM PARTIES DO NOT ENDORSE CONTENT AND SPECIFICALLY DISCLAIM ANY RESPONSIBILITY OR LIABILITY TO ANY PERSON OR ENTITY FOR ANY LOSS, DAMAGE (WHETHER ACTUAL, CONSEQUENTIAL, PUNITIVE OR OTHERWISE), INJURY, CLAIM, LIABILITY OR OTHER CAUSE OF ANY KIND OR CHARACTER BASED UPON OR RESULTING FROM ANY CONTENT.

Limitation of Liability; Waiver

UNDER NO CIRCUMSTANCES WILL THE INSTAGRAM PARTIES BE LIABLE TO YOU FOR ANY LOSS OR DAMAGES OF ANY KIND (INCLUDING, WITHOUT LIMITATION, FOR ANY DIRECT, INDIRECT, ECONOMIC, EXEMPLARY, SPECIAL, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL LOSSES OR DAMAGES) THAT ARE DIRECTLY OR INDIRECTLY RELATED TO: (A) THE SERVICE; (B) THE INSTAGRAM CONTENT; (C) USER CONTENT; (D) YOUR USE OF, INABILITY TO USE, OR THE PERFORMANCE OF THE SERVICE; (E) ANY ACTION TAKEN IN CONNECTION WITH AN INVESTIGATION BY THE INSTAGRAM PARTIES OR LAW ENFORCEMENT AUTHORITIES REGARDING YOUR OR ANY OTHER PARTY'S USE OF THE SERVICE; (F) ANY ACTION TAKEN IN CONNECTION WITH COPYRIGHT OR OTHER INTELLECTUAL PROPERTY OWNERS; (G) ANY ERRORS OR OMISSIONS IN THE SERVICE'S OPERATION; OR (H) ANY DAMAGE TO ANY USER'S COMPUTER, MOBILE DEVICE, OR OTHER EQUIPMENT OR TECHNOLOGY INCLUDING, WITHOUT LIMITATION, DAMAGE FROM ANY SECURITY BREACH OR FROM ANY VIRUS, BUGS, TAMPERING, FRAUD, ERROR, OMISSION, INTERRUPTION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, COMPUTER LINE OR NETWORK FAILURE OR ANY OTHER TECHNICAL OR OTHER MALFUNCTION, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, LOSS OF GOODWILL, LOSS OF DATA, WORK STOPPAGE, ACCURACY OF RESULTS, OR COMPUTER FAILURE OR MALFUNCTION, EVEN IF FORESEEABLE OR EVEN IF THE INSTAGRAM PARTIES HAVE BEEN ADVISED OF OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER IN AN ACTION OF CONTRACT, NEGLIGENCE, STRICT LIABILITY OR TORT (INCLUDING, WITHOUT LIMITATION, WHETHER CAUSED IN WHOLE OR IN PART BY NEGLIGENCE, ACTS OF GOD, TELECOMMUNICATIONS FAILURE, OR THEFT OR DESTRUCTION OF THE SERVICE). IN NO EVENT WILL THE INSTAGRAM PARTIES BE LIABLE TO YOU OR ANYONE ELSE FOR LOSS, DAMAGE OR INJURY, INCLUDING, WITHOUT LIMITATION, DEATH OR PERSONAL INJURY. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN NO EVENT WILL THE INSTAGRAM PARTIES TOTAL LIABILITY TO YOU FOR ALL DAMAGES, LOSSES OR CAUSES OR ACTION EXCEED ONE HUNDRED UNITED STATES DOLLARS (\$100.00).

YOU AGREE THAT IN THE EVENT YOU INCUR ANY DAMAGES, LOSSES OR INJURIES THAT ARISE OUT OF INSTAGRAM'S ACTS OR OMISSIONS, THE DAMAGES, IF ANY, CAUSED TO YOU ARE NOT IRREPARABLE OR SUFFICIENT TO ENTITLE YOU TO AN INJUNCTION PREVENTING ANY EXPLOITATION OF ANY WEB SITE, SERVICE, PROPERTY, PRODUCT OR OTHER CONTENT OWNED OR CONTROLLED BY THE INSTAGRAM PARTIES, AND YOU WILL HAVE NO RIGHTS TO ENJOIN OR RESTRAIN THE DEVELOPMENT, PRODUCTION, DISTRIBUTION, ADVERTISING, EXHIBITION OR EXPLOITATION OF ANY WEB SITE, PROPERTY, PRODUCT, SERVICE, OR OTHER CONTENT OWNED OR CONTROLLED BY THE INSTAGRAM PARTIES.

BY ACCESSING THE SERVICE, YOU UNDERSTAND THAT YOU MAY BE WAIVING RIGHTS WITH RESPECT TO CLAIMS THAT ARE AT THIS TIME UNKNOWN OR UNSUSPECTED, AND IN ACCORDANCE WITH SUCH WAIVER, YOU ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND, AND HEREBY EXPRESSLY WAIVE, THE BENEFITS OF SECTION 1542 OF THE CIVIL CODE OF CALIFORNIA, AND ANY SIMILAR LAW OF ANY STATE OR TERRITORY, WHICH PROVIDES AS FOLLOWS: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

INSTAGRAM IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES, AND YOU RELEASE US, OUR DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS AND DAMAGES, KNOWN AND UNKNOWN, ARISING OUT OF OR IN ANY WAY CONNECTED WITH ANY CLAIM YOU HAVE AGAINST ANY SUCH THIRD PARTIES.

Indemnification

You (and also any third party for whom you operate an account or activity on the Service) agree to defend (at Instagram's request), indemnify and hold the Instagram Parties harmless from and against any claims, liabilities, damages, losses, and expenses, including without limitation, reasonable attorney's fees and costs, arising out of or in any way connected with any of the following (including as a result of your direct activities on the Service or those conducted on your behalf): (i) your Content or your access to or use of the Service; (ii) your breach or alleged breach of these Terms of Use; (iii) your violation of any third-party right, including without limitation, any intellectual property right, publicity, confidentiality, property or privacy right; (iv) your violation of any laws, rules, regulations, codes, statutes, ordinances or orders of any governmental and quasi-governmental authorities, including, without limitation, all regulatory, administrative and legislative authorities; or (v) any misrepresentation made by you. You will cooperate as fully required by Instagram in the defense of any claim. Instagram reserves the right to assume the exclusive defense and control of any matter subject to indemnification by you, and you will not in any event settle any claim without the prior written consent of Instagram.

Arbitration

Except if you opt-out or for disputes relating to: (1) your or Instagram's intellectual property (such as trademarks, trade dress, domain names, trade secrets, copyrights and patents); (2) violations of the API Terms; or (3) violations of provisions 13 or 15 of the Basic Terms, above ("Excluded Disputes"), you agree that all disputes between you and Instagram (whether or not such dispute involves a third party) with regard to your relationship with Instagram, including without limitation disputes related to these Terms of Use, your use of the Service, and/or rights of privacy and/or publicity, will be resolved by binding, individual arbitration under the American Arbitration Association's rules for arbitration of consumer-related disputes and you and Instagram hereby expressly waive trial by jury. As an alternative, you may bring your claim in your local "small claims" court, if permitted by that small claims court's rules. You may bring claims only on your own behalf. Neither you nor Instagram will participate in a class action or class-wide arbitration for any claims covered by this agreement. You also agree not to participate in claims brought in a private attorney general or representative capacity, or consolidated claims involving another person's account, if Instagram is a party to the proceeding. This dispute resolution provision will be governed by the Federal Arbitration Act. In the event the American Arbitration Association is unwilling or unable to set a hearing date within one hundred

and sixty (60) days of filing the case, then either Instagram or you can elect to have the arbitration administered instead by the Judicial Arbitration and Mediation Services. Judgment on the award rendered by the arbitrator may be entered in any court having competent jurisdiction. Any provision of applicable law notwithstanding, the arbitrator will not have authority to award damages, remedies or awards that conflict with these Terms of Use.

You may opt out of this agreement to arbitrate. If you do so, neither you nor Instagram can require the other to participate in an arbitration proceeding. To opt out, you must notify Instagram in writing within 30 days of the date that you first became subject to this arbitration provision. You must use this address to opt out:

Instagram, LLC ATTN: Arbitration Opt-out 1601 Willow Rd. Menlo Park, CA 94025

You must include your name and residence address, the email address you use for your Instagram account, and a clear statement that you want to opt out of this arbitration agreement.

If the prohibition against class actions and other claims brought on behalf of third parties contained above is found to be unenforceable, then all of the preceding language in this Arbitration section will be null and void. This arbitration agreement will survive the termination of your relationship with Instagram.

Time Limitation on Claims

You agree that any claim you may have arising out of or related to your relationship with Instagram must be filed within one year after such claim arose; otherwise, your claim is permanently barred.

Governing Law & Venue

These Terms of Use are governed by and construed in accordance with the laws of the State of California, without giving effect to any principles of conflicts of law AND WILL SPECIFICALLY NOT BE GOVERNED BY THE UNITED NATIONS CONVENTIONS ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, IF OTHERWISE APPLICABLE. For any action at law or in equity relating to the arbitration provision of these Terms of Use, the Excluded Disputes or if you opt out of the agreement to arbitrate, you agree to resolve any dispute you have with Instagram exclusively in a state or federal court located in Santa Clara, California, and to submit to the personal jurisdiction of the courts located in Santa Clara County for the purpose of litigating all such disputes.

If any provision of these Terms of Use is held to be unlawful, void, or for any reason unenforceable during arbitration or by a court of competent jurisdiction, then that provision will be deemed severable from these Terms of Use and will not affect the validity and enforceability of any remaining provisions. Instagram's failure to insist upon or enforce strict performance of any provision of these Terms will not be construed as a waiver of any provision or right. No waiver of any of these Terms will be deemed a further or continuing waiver of such term or condition or any other term or condition. Instagram reserves the right to change this dispute resolution provision, but any such changes will not apply to disputes arising before the effective date of the amendment. This dispute resolution provision will survive the termination of any or all of your transactions with Instagram.

Entire Agreement

If you are using the Service on behalf of a legal entity, you represent that you are authorized to enter into an agreement on behalf of that legal entity. These Terms of Use constitute the entire agreement between you and Instagram and governs your use of the Service, superseding any prior agreements between you and Instagram. You will not assign the Terms of Use or assign any rights or delegate any obligations hereunder, in whole or in part, whether voluntarily or by operation of law, without the prior written consent of Instagram. Any purported assignment or delegation by you without the appropriate prior written consent of Instagram will be null and void. Instagram may assign these Terms of Use or any rights hereunder without your consent. If any provision of these Terms of Use is found by a court of competent jurisdiction to be invalid or otherwise unenforceable, the parties nevertheless agree that such portion will be deemed severable from these Terms of Use and will not affect the validity and enforceability of the remaining provisions, and the remaining provisions of the Terms of Use remain in full force and effect. Neither the course of conduct between the parties nor trade practice will act to modify the Terms of Use. These Terms of Use do not confer any third-party beneficiary rights.

Territorial Restrictions

The information provided within the Service is not intended for distribution to or use by any person or entity in any jurisdiction or country where such distribution or use would be contrary to law or regulation or which would subject Instagram to any registration requirement within such jurisdiction or country. We reserve the right to limit the availability of the Service or any portion of the Service, to any person, geographic area, or jurisdiction, at any time and in our sole discretion, and to limit the quantities of any content, program, product, service or other feature that Instagram provides.

Software related to or made available by the Service may be subject to United States export controls. Thus, no software from the Service may be downloaded, exported or re-exported: (a) into (or to a national or resident of) any country to which the United States has embargoed goods; or (b) to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Deny Orders. By downloading any software related to the Service, you represent and warrant that you are not located in, under the control of, or a national or resident of, any such country or on any such list.

The effective date of these Terms of Use is January 19, 2013. These Terms of Use were written in English (US). To the extent any translated version of these Terms of Use conflicts with the English version, the English version controls.